TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 452

ANTHONY REYBOLD ET AL., APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS

FILED DECEMBER 23, 1871.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~173~~ 256

ANTHONY REYBOLD ET AL., APPELLANTS.

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS

FILED JANUARY 10, 1871.

SUPREME COURT OF THE UNITED STATES.

No. 473.

ANTHONY REYBOLD ET AL., APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print.
Claimant's petition	1	1
Traverse by Attorney General	10	5
Final judgment of the court	12	6
Application by counsel for claimants for allowance of appeal	13	6
Order of the court allowing same	13	6
Findings of fact, and conclusions of law	14	6
Request of counsel for claimants to find as to matter of fact	15	8
Certificate	17	9

1 U. S. Court of Claims.

ANTHONY REYBOLD, GEORGE F. NEEDHAM, AND Asa Needham,
against
THE UNITED STATES. } 5652.

To the Court of Claims:

The petition of the above-named plaintiffs respectfully shows—

That, on the seventeenth day of November, 1863, your petitioner, Anthony Reybold, entered into a contract of affreightment with the United States, for the steam-vessel called the Express, whereby the United States agreed to freight take, and your said petitioner agreed to grant and to freight let, the said vessel from the first day of November, 1863, until said vessel should be returned to your said petitioner in Delaware City, Delaware.

That said contract or charter-party was duly executed on the day it bears date, by your said petitioner, Anthony Reybold, and on the part of the United States by Stewart Van Vliet, then major and quartermaster of the United States Army, the said Van Vliet then being an agent of the United States, duly authorized to execute said charter-party on their behalf, and which said charter-party is in the words and figures following:

2 "This charter-party of affreightment, made this first day of November, in the year one thousand eight hundred and sixty-three, between Anthony Reybold, owner of the steamer or vessel called the Express, of Delaware City, Del., of burthen of 382 registered tons, or thereabouts, at present in employ of Government, and commanded by Phillip R. Clark, of the first part; and major Stewart Van Vliet, quartermaster U. S. A., for the United States of the second part: Witnesseth, that the said party of the first part does and doth hereby grant, and to freight let, and the said party of the second part does and doth hereby to freight take, the said steamer Express, to load at Fort Monroe, Va., or elsewhere, and proceed on the voyage hereinafter mentioned. (Always reserving sufficient room for the stowage of the vessel's cables and materials, and accommodation of the officers and crew, and, if a steam-vessel, for necessary supply of coal.) And thereupon the party of the first part, and his heirs, executors, administrators and assigns, doth hereby covenant, grant and agree to and with the said party of the second part, that the said vessel now is, and shall be kept and maintained during the whole of the voyage mentioned in this contract, tight, staunch, strong, and well and sufficiently manned, victualed, tackled, appareled and ballasted, and furnished in every respect fit for merchant's service, at the cost and charge of her owners. (The time lost in consequence of any deficiency in these respects not to be paid for by the United States.) And shall on the first day of November, 1863, be ready to receive on board, whenever tendered alongside, by the Quartermaster U. S. Army, his factors or assigns, such troops, men, animals and supplies, or cargo, as they shall order and direct, and the said vessel can conveniently stow and carry, and when laden shall proceed, with the first good opportunity, and without delay, from the port of Fort Monroe, Va., or elsewhere, and proceed direct to such ports and places as ordered by the Quartermaster U. S. Army, and deliver cargo to the quartermaster or duly authorized agent of the Quartermaster's Department. All pilotage and port charges will be paid by the

3 United States after leaving the port of Fort Monroe, Va., or else-

where, all cargo to be received and delivered within reach of said vessel's tackles. The said vessel shall deliver her cargo in good order and condition, (the dangers of the seas, fire, and navigation, and the restraints of princes and rulers being always excepted.) The war risk to be borne by the United States. The marine risk to be borne by the owners.

"In consideration whereof the said party of the second part does agree to employ the said vessel on the voyage or voyages aforesaid; and that as a freight or hire of the said vessel during the time of this contract, he will pay, or cause to be paid, the full and just sum of one hundred dollars per day, for each and every day said vessel may be employed, and will furnish all fuel necessary for the navigation of the said vessel, if a steamer, until the said vessel is returned to the said party of the first part in Delaware City, Del., in the same order as when received, ordinary wear and tear, damage by the elements, collision at sea, and in port, bursting of boilers, and breakage of machinery excepted; to become due, owing and payable in the manner and form following, that is to say, payable to the order of R. F. Loper, attorney, at the quartermaster's office of the United States, at New York, monthly, upon presenting certificates of the duly authorized agent of the Quartermaster's Department that the said vessel has faithfully performed her part of this contract.

"The said vessel is valued and appraised at the sum of fifty-five thousand dollars, and should she be retained so long in the service of the United States that the money paid and due on account of said charter (deducting therefrom the actual cost of running and keeping in repair the said vessel during the said time, together with a net profit of forty per cent. per annum on said appraised value) shall be equal to said appraised value, then the said vessel shall become the property of the United States without further payment, except such sum as may
4 then be due on account of the services of the said vessel rendered under the said charter.

"And further, if at any time during the continuance of this charter the United States shall elect to purchase the said vessel, then they shall have the right to take her at the appraised value at the date of charter, and all money then already paid and due on account of said charter (deducting therefrom the actual cost of running and keeping in repair the said vessel during the said time, together with a net profit of forty per cent. per annum on the original appraised value,) shall apply on account of the said purchase.

"This charter shall go into effect at one o'clock a. m. of the first November, 1863, and shall continue in force as long as said vessel may be required by the U. S. War Department.

"No member of Congress shall be admitted to any share or part of this contract, or any benefit to arise therefrom.

"In witness whereof the said parties to these presents have hereunto interchangeably set their hands and affixed their seals on the 17th day of November, 1863.

"(Executed in quintuplicate.)

"ANTHONY REYBOLD. [SEAL.]
"STEWART VAN VLEIT, *Q. M.* [SEAL.]

"Signed, sealed and delivered in the presence of—
"GEO. W. TOBIAS.
"F. M. GREEN."

And your petitioners further show that the United States took possession of said vessel on the first day of November, 1863, under said charter-party, and continued such possession, and to employ her in their military service, until she was sunk and lost as hereinafter stated.

5 And your petitioners further show, on information and belief, that, on and during the 20th and 21st days of January, 1865, the navigation of the Potomac River became and was extremely dangerous and hazardous to all classes of vessels thereon, by reason of large quantities of ice of great thickness then running in large masses in said river. and that the danger and hazard by reason of the ice aforesaid to vessels attempting to navigate said river on the days aforesaid, were apparent to all persons within view of said river; that, on the said 20th day of January, 1865, the said vessel was in the possession and employment in the military service of the United States, under said charter-party, subject to the orders of the officers of the Quartermaster's Department of the United States, and was lying secure and in safety from the danger and hazard aforesaid at a wharf in the port of Washington.

And your petitioners further show, on information and belief, that, in the evening of said 20th day of January, 1865, while said vessel was lying in said port of Washington aforesaid, E. S. Allen, captain and assistant quartermaster of the United States Army, then having full power and authority for that purpose, and with full knowledge of the condition of said river and of the danger and hazard to vessels attempting to navigate the same, by reason of the ice then running therein, and with full knowledge of the quantity and character of said ice, and in full view of said river, and of the dangers and hazard aforesaid, made and delivered to the captain in command of said vessel, an order in the words and figures following:

"ASSISTANT QUARTERMASTER'S OFFICE,
"SIXTH-STREET WHARF,
"*Washington, D. C., Jan'y* 20, 1865.

"Captain of steamer Express:

"SIR: Having received on board 75 men, to-morrow morning
6 proceed to Giesboro, report to Capt. L. L. Moore, A. Q. M., receive on board 80 horses, proceed to City Point, report to Col. G. W. Bradley, Q. M., land the men and horses, return to this city and report to me, unless otherwise ordered.

"Respectfully,
"(Signed) "E. S. ALLEN,
"*Capt. & A. Q. M.*"

And your petitioners further show, on information and belief, that, on receipt of said order, the captain of said vessel, to whom said order was addressed and delivered, proceeded, with promptness and diligence, to execute the same, and in pursuance thereof, undertook to make the voyage upon said river, thereby commanded; that in discharge of the said duty, he exercised great care, prudence, and nautical skill, but, without fault or negligence on the part of said captain, or the officers or men under his command, said vessel, while she was proceeding down said river, in obedience to said order, was struck by large masses of ice; her hull was crushed in, and she was sunk in about twenty-four feet of water, and was necessarily and unavoidably abandoned and lost.

That she remained sunk, as aforesaid, for about the period of six weeks, during which time she drifted with the current down the stream about the distance of ten miles, and her upper works were completely carried

away by the water and ice passing over her. And your petitioners further show that, subsequently, and on or about the 13th day of May, 1865, they received a notice of which the following is a copy:

"DEP'T QUARTERMASTER'S OFFICE,
"RAILROAD AND WATER TRANSPORTATION DEPARTMENT,
"*Baltimore, Md., May 13th*, 1865.

"Capt. of the steamer Express:

"The services of the steamer Express being no longer required,
7 she is discharged from Government service, by order of the Quartermaster General; discharge to commence January 21st, 7 p. m., 1865.

"Respectfully,

"R. M. NEWPORT,
"*Col. & Q'r'm'r.*"

And your petitioners further show that, after said vessel had remained sunk as aforesaid, for about six weeks, and as soon after she was sunk as the weather and the condition of the river would permit, they, by aid of wreckers, raised the hull of said vessel, and rebuilt her, and restored her to the condition in which she was at the time she was sunk as aforesaid, as nearly as they were able to do, and that in and about the work done and materials used in thus rebuilding and restoring her, they necessarily expended and paid out the sum of forty-two thousand nine hundred and twenty-three dollars and seventy-three cents.

And your petitioners further show that they have presented to the Quartermaster General of the United States, a detailed statement of the amount paid out and expended by them in rebuilding and repairing said vessel, and restoring her to her former condition as aforesaid, and made application for the allowance and payment thereof, as the amount of damages sustained by your petitioners by reason of the injury to said vessel incurred as aforesaid, and the Quartermaster General rejected said application and claim, and every part thereof; that thereupon your petitioners presented said statement and claim and application with sufficient evidence of the facts therein alleged to the Third Auditor of the Treasury of the United States, who made a report thereon, in writing, addressed to the Second Comptroller of the Treasury of the United States, adverse to the payment of said claim, or any part thereof, and delivered said report and the said statement and claim, and the evidence and vouchers relating thereto, to said Second Comptroller, who subsequently made his decision thereon, in writing, and rejected said claim, and every part thereof.

8 And your petitioners further show that, at the time the contract hereinbefore recited was made, your petitioner, Anthony Reybold, was the sole owner of said vessel, and that she was registered at the custom-house for the port of Delaware City, in his name, but that during the continuance of said contract, your petitioners, George F. Needham and Asa Needham, became the owners, each of one-fourth part thereof, and, at the time she was sunk as aforesaid, your petitioners were the owners of the said vessel in the following shares:

Anthony Reybold, of Delaware City, in the State of Delaware, one-half part.

George F. Needham, of Baltimore, in the State of Maryland, one-fourth part.

Asa Needham, of Baltimore, in the State of Maryland, one-fourth part.

And your petitioners further show that they are, each and all, citizens of the United States, and that they have, and each one of them has, at all times borne true allegiance to the Government of the United States, and that they have not, nor has either of them, in any way voluntarily aided, or abetted, or given encouragement to the rebellion against the said government.

Your petitioners further show that they rely upon the law of Congress, entitled, "An act to provide for the payment of horses and other property lost or destroyed in the military service of the United States," passed March 3d, 1849.

And also upon the contract with the United States, hereinbefore set forth, and they demand judgment for the said sum of forty-two thousand nine hundred and twenty-three dollars and seventy-three cents damages sustained by them by reason of the injury to said vessel as hereinbefore stated.

EDWARD FITCH,
Solicitor for the Plaintiffs, 23 Nassau Street, New York City.

9 CITY OF BALTIMORE, *State of Maryland, ss:*

Geo. F. Needham, of said city and State, being duly sworn, says that no assignment or transfer of the claim stated in the foregoing petition, or of any part thereof, or of any interest therein, has been made, except as in said petition stated. That said claimants are justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets, and that deponent believes the facts as stated in said petition are true.

GEO. F. NEEDHAM.

Sworn and subscribed before me this 11th day of February, 1869.
ISAAC BROOKS, JR.
United States Commissioner in and for the District of Maryland.

9½ *City of Baltimore, State of Maryland ss:*

Geo. F. Needham, of said city and State, being duly sworn, says that no assignment or transfer of the claim stated in the foregoing petition, or of any part thereof, or of any interest therein, has been made, except as in said petition stated. That said claimants are justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets, and that deponent believes the facts as stated in said petition are true.

GEO. F. NEEDHAM.

Sworn and subscribed before me this 11th day of February, 1869.
ISAAC BROOKS, Jr.,
United States Commissioner in and for the District of Maryland.

10, 11 In the United States Court of Claims, December term, A. D. 1868.

ANTHONY REYBOLD ET AL. *vs.* THE UNITED STATES. } No. 5652.

And the said defendants, by their attorney general, come and make answer to the petition of the claimant herein; and, not confessing the

same, or any part thereof, deny each and every the allegations therein contained, and call for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the said United States are indebted to the said claimant in the sum of forty-two thousand nine hundred and twenty-three dollars & seventy-three cents, the said defendants say that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimants have at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the said defendants deny the said allegation.

T. LYLE DICKEY,
Assistant Attorney General.

12 In the Court of Claims.

ANTHONY REYBOLD, GEO. F. NEEDHAM, & Asa Needham,
vs.
THE UNITED STATES. } 5652.

And now, to wit, 28th of February, A. D. 1870, the court upon due consideration of the premises, find in favor of the defendants, and do order, adjudge, and decree that the said claimants take nothing by their suit, and that their petition be dismissed.

By the court.

A true copy of record.

13 In the Court of Claims.

ANTHONY REYBOLD, GEORGE F. NEEDHAM, & Asa Needham,
vs.
THE UNITED STATES. } 5652.

To the Court:

The petitioners in the above-entitled action humbly apply to this court for an appeal to the Supreme Court of the United States, from the judgment of this court dismissing the petition in this action.

Dated March 29, 1870.

EDWARD FITCH,
Att'y for Claimants.

Filed in clerk's office, 29 March, 1870.

Ordered that the appeal prayed in the case of Anthony Reybold et al. vs. The United States, 5652, be allowed.

By the court.

MARCH 29, 1870.

14 In the Court of Claims.

ANTHONY REYBOLD ET AL.
vs.
THE UNITED STATES. } 5652.

In this case the court find the facts to be—

That, on the 17th day of November, 1863, Anthony Reybold, one of

the petitioners, was the owner of the steam-vessel called the Express, of Delaware City, in the State of Delaware, and then in the employment of the United States.

That, on that day, the said owner, by contract made with Major Stewart Van Vleit, quartermaster in the service of the United States, and for that purpose duly authorized, chartered said vessel to the United States upon the terms in said contract or charter-party duly and fully stated, which charter-party is fully set forth in the claimant's petition.

That, on the 6th day of January, 1865, and while said vessel was in the employment of the United States under said charter party, the said Anthony Reybold sold to George F. Needham and Asa Needham, two of the petitioners herein, each one-quarter of said vessel.

That, on the 20th of January, 1865, the said vessel was in the service of the United States under said charter-party, was tight, staunch, strong, and well and sufficiently manned, victualled, tackled, apparalled, and ballasted, and furnished in every respect fit for the said service, and was lying in safety at a wharf in the port of Washington, in the District of Columbia. And for protection against ice was sheathed with iron in her forward part twelve inches, and elsewhere six inches above her water-line when loaded. And this is as high as such vessels are usually ironed, and the iron was in good order.

That, on the 20th and 21st days of January, 1865, the Potomac River was frozen over from bank to bank at Washington, and the ice, from six to eight inches thick, extended on the shores about forty miles down the river. The channel only was kept open by the current and the passage of vessels, but masses of ice six or eight inches thick were floating in the channel. The weather was wet and cold, and ice was making. And in consequence of this condition of the river its navigation was suspended, except by Government steamers and the ferry-boats between Washington and Alexandria.

That, on the 20th day of January, 1865, and before that, Captain E. T. Allen, assistant quartermaster of volunteers, was in command of the army transportation on the Potomac, and had his office at the Sixth-street wharf in Washington, in view of the river, and about sixty yards from it, and the condition of the river was visible and known to him.

That, on the said 20th day of January, 1865, Captain Allen, acting in discharge of his official duty, issued to the master in command of said steamer Express the following order:

"SIR: Having received on board seventy-five men, to-morrow morning proceed to Giesboro; report to Captain L. L. Moore, assistant quartermaster; receive on board eighty horses; proceed to City Point; report to Colonel G. W. Bradley, quartermaster; land the men and horses; return to this city and report to me, unless otherwise ordered."

And the said order was then necessary and required for the military service of the United States.

Previous to giving said order said quartermaster Allen was, in answer to his inquiries, informed that the Express was sheathed with iron, and was of capacity to take the men, horses, &c., to City Point, by the captain of the Express, who made no objection to the order, because, as he testified, he considered it imperative as a military order, and as such obeyed it, though, if he had considered he could have used his judgment, he would not have left the wharf, as he did not consider it safe.

That, on the 21st day of January, in obedience to said order, the master of the Express was proceeding with said steamer down the river with the men, horses, &c., on board, and when about twenty eight or thirty miles down the river, opposite Glymont and just above Indian Head,

her hull was cut or crushed in by heavy cakes of floating ice, twenty-five or thirty feet abaft her wheel, on the starboard side and in her bows, and she filled and sank in about three and a half fathoms of water in two or three hours after she began to leak. And the injury and sinking of the Express were without any fault on the part of her officers and crew, who navigated the boat with due skill and care.

That, before the Express sank, the steamer City Point and a propeller, General Rucker, came to her relief, and succeeded in taking off the men and horses with which she was loaded, and her officers and crew.

That the side-wheel steamer City Point and two propellers, the General Rucker and W. Millden, all in the military service of the United States, started down the river from Alexandria that day. The Millden, an iron propeller, turned back, from what cause was not shown. The City Point and General Rucker went through. On the day following the steamer Thomas Jefferson went up the river, and on her arrival at Alexandria was leaking badly, but it was not shown what caused her to leak.

That the Express was necessarily abandoned where she sank, and remained in the water subject to the action of the elements about six weeks, and during that time drifted several miles down the river. As soon as the weather permitted she was raised by wreckers employed by the petitioners, and towed into Baltimore and repaired.

That the necessary and reasonable expenses paid by the owners for raising said steamer, towing her into Baltimore, and repairing her were as follows, viz: For raising and towing the steamer into Baltimore, $15,000; for repairs, $27,923 43—amounting altogether to the sum of $42,923 43. And after deducting therefrom one-third of said cost of said repairs, viz, $9,307 81, for new for old, the said claimants would be entitled to recover the balance of $39,615 99, if they were entitled to recover anything.

That the petitioners have at all times borne true allegiance to the Government of the United States, and they have not, nor has either of them, in any way voluntarily aided, abetted, or given encouragement to the rebellion against said Government.

And we find as conclusions of law:

1. That the peril by which the steamer Express was damaged was within the term "marine risks" in the charter-party, and by the terms thereof was to be borne by the owners.

2. That the charter-party placed the steamer in the military service of the United States in a time of war, and the term "marine risks" in the charter-party is to be construed in reference to that service, and includes risks from perils of the sea and seasons incident to that service and its exigencies.

That the steamer, being by the charter-party in the military service, was subject to military orders necessary for the proper performance of that service.

By the court.

A true copy of record.

15 In the Court of Claims.

ANTHONY REYBOLD ET AL. vs. THE UNITED STATES. } 5652.

To the Court:

Counsel for the claimants respectfully request the court to find as follows:

That, on the twentieth and twenty-first days of January, 1865, the Potomac River was frozen over from shore to shore at Washington. The ice was from six to eight inches thick, and extended about forty miles down the river, but how it was below that distance did not appear. A channel was kept open by the passage of steam-vessels in the service of the Government, but the channel was full of masses of floating ice from six to eight inches thick, and it froze over at night when the boats were not running. In places in the channel the ice was piled up and cemented together. The weather was wet and cold, and ice was making. In consequence of this condition of the river its navigation was suspended, except by Government steamers in the transport service and the ferry-boats between Washington & Alexandria.

16 And also, that, before the Express sank, the steamer City Point and a propeller, General Rucker, came to her relief, and succeeded, though with great difficulty on account of the ice, in taking off the men and horses with which she was loaded, and her officers and crew.

EDWARD FITCH,
Counsel for Claimants.

A true copy of request of counsel for claimants to find as to matters of fact filed in clerk's office May 17, 1870.

17 In the Court of Claims.

ANTHONY REYBOLD ET AL.
vs.
THE UNITED STATES. } No. 5652.

I, John Randolph, assistant clerk *clerk* of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon; of the application of the counsel for claimants for the allowance of an appeal, as filed in the clerk's office 29 March, 1870, and of the order of the said court allowing the same; of the findings of fact, and the conclusions of law thereon on which the court founded its judgment; and also, of the request of counsel for claimants to find as to matter of fact, filed in clerk's office May 17, 1870.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this 29th day of October, 1870.

[SEAL.] JOHN RANDOLPH,
Assistant Clerk Court of Claims.

(Indorsement on cover:) No. 473. Anthony Reybold, George F. Needham, and Asa Needham, appellants, vs. The United States. Court of Claims. Filed 10th January, 1870.

54

In the Supreme Court of the United States.

ANTHONY REYBOLD ET AL., *Appellants*,

vs.

THE UNITED STATES.

Brief for Appellants.

The facts as found by the Court below appear on pages 7 and 8 of the record.

The charter party, which is the subject of the action, is set forth in the appellants' petition to the Court below and appears on pages 1 and 2 of the record.

Special attention is requested to the following covenants, on the part of the owners, therein contained:

"That the said vessel now is and shall be kept and maintained during the whole of the voyage mentioned in this contract, tight, staunch, strong, and well and sufficiently manned, victualed, tackled, apparelled, and ballasted, and furished in every respect fit for merchant service at the cost and charge of her owners. (The time lost in consequence of any deficiency in these respects not to be paid for by the United States.") * * * *

"And when laden shall proceed *with the first good opportunity*," etc.

"*The war risks to be borne by the United States. The marine risk to be borne by the owners.*"

Assignment of Error.

The Court below erred in finding as conclusions of law—

1. That the peril by which the steamer Express was damaged was within the term "marine risks" in the charter party, and by the terms thereof was to be borne by the owners.

2. That the charter party placed the steamer in the military service of the United States in a time of war, and the term "ma-

rine risks" in the charter party is to be construed in reference to that service, and includes risks from perils of the sea and seasons incident to that service and its exigencies.

Points.

I. The master and crew were the servants of the owners, who appointed, paid, and subsisted them. It was the clear intent and meaning of the covenants and stipulations, contained and expressed in the charter party, that the master should see to and control the navigation of the vessel and direct her motions. The quartermaster could "order and direct" the freight to be carried and the "ports and places" at which it should be delivered; in other words, her destination and employment. The owners maintained control, through the officers and crew, over the mode of her navigation, and were alone responsible for the negligence or unskilfulness of the officers and seamen.

Fenton *vs.* The Dublin Steam Packet Co., 1 Per. & Dew. 103, 8 Adol. & El. 1836; Quarman *vs.* Bennett, 6 Mee. & W. 409; Martin *vs.* Temperly, 7 Jurist 250; Hooe *vs.* Goverman, 1 Cranch 214; Marcardine *vs.* Chesapeake Insrn. Co., 8 Cranch 29. See, also, Gracia *vs.* Palmer, 8 Wheaton 605; The Ship Nathaniel Hooper, 3 Sumner 576; McIntyre *vs.* Brown, 1 John. 229; Reed *vs.* The United States, 11 Wallace, 581.

II. Upon the master devolved the duty of determining when the "good opportunity" mentioned in the charter party presented, and it was the clear right of the owners that he should be permitted freely to perform that duty. Independent of any provision in the charter party, the right and duty of determining when the state of the weather and other conditions affecting navigation are suitable for the commencement of the voyage appertain to the office of master of the vessel. "The master must commence his voyage without delay as soon as the weather is favorable." "*But he must on no account sail out during tempestuous weather.*" By most of the ancient marine ordinances the master is required before he hoists sail to consult his mate, pilot, and others of the crew, as to the wind and weather. But such consultation is not required by the law of England, according to

which the entire management of the ship is entrusted to the master. The same is true as to the law of the United States.

Abbott on Shipping, Part 4, chapter 5, page 351 (original), and cases and ordinances cited in note thereto.

III. The order of Quartermaster Allen deprived the master of the steamer of the right to judge whether the "good opportunity" mentioned in the charter party existed. It defined and specified the time for the commencement of the voyage. "*To-morrow morning*" was the point of time named for the departure of the vessel, without regard to the state of the weather or the condition of the river.

Indeed from the facts found it appears that the order was given, and the time for the departure of the vessel was fixed, by the quartermaster with full knowledge of the dangerous condition of the river and with reference to it. The order substituted the command of the quartermaster for the judgment of the captain. The departure of the vessel at that time, in face of apparent danger, was an unskilful and negligent act of navigation, for which the United States, and not the owners, are responsible.

IV. The order of the quartermaster was a military order, issued by a military officer of the United States "acting in discharge of his official duty" in time of war. Obedience to it could not be refused. It must be regarded as of the same effect as if given by the President.

Opinion of Clifford, Justice, in Williams *vs.* The N. E. M. M. Ins. Co., U. S. Circuit Court of Mass., May term, 1869; the Venice, 2 Wall, 276.

But the United States are estopped from alleging that the master should not have obeyed it. They cannot be permitted to complain because the master did what they, by their duly authorized agent, commanded him to do. His act was their act, for he was acting within the scope of his authority. Nor can the fact, that the master obeyed without objection, relieve them from the responsibility of the order and its consequence. To object was no part of his duty. Besides the court below have found that he "made no objection to the order because," as he testified, "he con-

sidered it imperative as a military order, and as such obeyed it, though if he had considered he could have used his judgment he would not have left the wharf, as he did not consider it safe."

It cannot be said that the master acquiesced, in the proper sense of the word. His opinion was not asked nor was he consulted in regard to the dangers to be encountered in making the voyage. He was asked in regard to the condition and capacity of his vessel, and to these inquiries he made truthful answers. But the voyage was not made the subject of negotiation or consultation between him and the quartermaster. The order was given, and received and obeyed as a military order simply, imperative in its terms and admitting no question.

V. By the term "marine risk," as used in the charter party, was evidently intended such risk from marine dangers and perils as the vessel would be subjected to while making her voyages under and in pursuance of the contract, that is, while controlled and navigated by the master and crew chosen by the owners. It was not intended that the United States could substitute some other person, by them chosen, in place of the master, and still continue the responsibility for the marine risk upon the owners. Nor was it intended that they could override the judgment of the master by military command, and cast upon the owners the risk from marine perils thereby incurred. The responsibility of the owners expressed by the term marine risk, in that connection, was limited to marine risks incurred by the vessel while under the control of the master and crew, and the United States could not extend or increase that responsibility by military orders.

The act of departure from port, in the commencement of a voyage, is an important act of navigation, in its performance calling for the exercise of nautical knowledge and sound judgment. When the United States substituted the order of the quartermaster for the judgment of the master of the vessel regarding that act, and sent the vessel out of a port of safety in face of a known peril, by which she was lost, they relieved the owners of the risk and took the responsibility.

VI. The order of the quartermaster worked a deviation within the plain meaning of that term as defined and used in reference to marine insurance.

"It is a perfectly well settled rule of law, that the vessel must not deviate from the proper course of the voyage. But the principle on which this prohibition rests extends to all other things which enter as elements into the calculation that determines the amount of premium. The result of this is that, although deviation in the law of insurance originally meant, no doubt, only a deviation from the course of the voyage, it is now always understood in the sense of any material departure from, or change in, the risks insured against, without just cause.

Parsons on Marine Insurance, chap. 1, vol. II., page 1.

The order, though "then necessary and required for the military service of the United States," and given by the quartermaster, "acting in discharge of his official duty," was wrongful as against the owners in view of the contract. It exposed the vessel to a risk which, by the terms of their contract with the United States, they did not agree to take. That wrongful act was beyond question the cause of the injury and loss incurred.

"No wrong-doer can be allowed to apportion or qualify his own wrong; and as a loss has actually happened whilst his wrongful act was in operation and force, which is attributable to his wrongful act, he cannot set up as an answer the bare possibility of a loss if his wrongful act had never been done."

Davis *vs.* Garrett, 6 Bingham, 716.

The charter party contains a covenant that the United States will employ and pay for the service of said steamer "Until the said vessel is returned to the said party of the first part, in Delaware City, in the same order as when received, ordinary wear and tear, damage by the elements, collision at sea and in port, bursting of boilers and breakage of machinery excepted." That covenant must be construed with reference to the other provisions of the charter party, by which the master was to control the navigation of the vessel. It obviously expressed a contract on the part of the United States to return the vessel to the owners at the port named, subject only to the exceptions mentioned occurring while

the vessel was under the control of the master. To entitle the United States to the benefit of the exceptions, or any one of them, such exceptions must have occurred or arisen without their fault or procurement. An injury occurring by any of the means mentioned as a direct consequence of the orders or directions of the officers or agents of the United States, acting within the scope of their authority, but not within the contract, would not form an exception so as to relieve the United States from the obligation to return the vessel in pursuance of the contract.

The judgment of the Court below should be reversed, and judgment in favor of the appellants for the amount of damages found by the Court of Claims should be rendered.

EDWARD FITCH,

Counsel for the Appellants.

In the Supreme Court of the United States.

DECEMBER TERM, 1871.

ANTHONY REYBOLD AND OTHERS
vs.
THE UNITED STATES.

No. 256.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

DECEMBER TERM, 1871.

ANTHONY REYBOLD AND OTHERS
vs.
THE UNITED STATES.
No. 256.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The claimants, owners of the steamer Express, chartered her to the Government under a charter-party, whereby it is agreed that the "war risk" should be borne by the United States and the "marine risk" by the owners. On the 20th and 21st of January, 1865, she was at Washington. The Potomac river was then frozen over, from bank to bank, and the ice was from six to eight inches thick. The channel was only kept open by the current and by the passage of vessels, and masses of ice were floating therein. In consequence of this condition of the river, the navigation was suspended except by Government steamers and the ferry boats, On the 20th of January, the master received an order to take certain men on board and proceed to Giesboro, and did so, considering the order as an imperative military order, and though he did not consider it safe to cross the river. While the vessel was crossing the

river, her hull was crushed by heavy cakes of ice, and she filled and sank. The injury in sinking was without any fault on the part of her officers or crew. The Court of Claims found that the peril by which the Express was damaged, was within the marine risk in the charter-party, and was to be borne by the owners.

ARGUMENT.

The loss of the Express was occasioned by the state of the navigation of the river; and the fact that the Government was at war, although it may have been one of the reasons why the vessel was ordered to cross the river in the then state of navigation, was too remote a cause to bring the loss within the war risk, which was the only one that the Government had assumed.

See Reed *vs.* The United States, 11 Wallace, 591.

United States *vs.* Kimball, 13 Wallace, 636.

Brief for the Government in the case of Leary *vs.* The United States, filed at the present term.

C. H. HILL,

Assistant Attorney General.